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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 352

UNITED STATES OF AMERICA, PETITIONER

v.

ILLINOIS CENTRAL RAILROAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The trial court's findings of fact and conclusions of law appear at R. 22–24. The opinion of the Circuit Court of Appeals (R. 52) is reported in 90 F. (2d) 213.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 26, 1937. (R. 56.) The petition for writ of certiorari was filed August 26, 1937, and granted October 11, 1937 (R. 57). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in an action for penalties under the Cruelty to Animals Act of June 29, 1906, the carrier can escape the penalty by showing that its default was due to the negligent oversight of one of its employees.

STATUTE INVOLVED

The applicable portions of the pertinent statutes will be found in the Appendix, *infra,* pp. 32–36.

STATEMENT

This is a civil action brought by the United States of America, petitioner, against the Illinois Central Railroad Company, a corporation, hereinafter referred to as respondent, to recover a penalty of not less than $100 nor more than $500 under the Act of June 29, 1906, c. 3594, Sections 1, 3, and 4, 34 Stat. 607, as amended (U. S. C., Title 45, Sections 71, 73, and 74), commonly known as the Cruelty to Animals Act.

The petition (R. 2) alleges that respondent "knowingly and wilfully" confined cattle in a car between Hermanville, Mississippi, and New Orleans, Louisiana, for 37 hours without unloading them for rest, water, and feeding, and that respondent actually transported them from Jackson, Mississippi, to New Orleans, Louisiana, the transportation from Hermanville, Mississippi, to Jackson, Mississippi, being by the Yazoo and Mississippi Valley Railroad Company.

Respondent, in its answer (R. 5), admitted the confinement for the 37-hour period alleged in the petition, but denied that it did so "knowingly and wilfully" and set up as an affirmative defense (R. 7) that the confinement was the result of the negligence of its night general yardmaster at New Orleans, who had been advised by telegraph of the approximate time of arrival of this car of cattle and when the legal confinement period of the cattle would expire. Upon the petition and answer, petitioner moved for judgment (R. 9), which motion was overruled and an exception reserved (R. 10).

The parties then entered into a stipulation of facts and waived trial by jury (R. 11). It was agreed, among other things, that the car was loaded with cattle at Hermanville, Mississippi, at 3 p. m. on October 8, 1932, and shipped to New Orleans, Louisiana, with a 36-hour release signed by the shipper (R. 12). This car arrived at Stuyvesant Dock [Stock] Yards at 11:35 p. m. on October 9, 1932, with two other cars of cattle (R. 13). Respondent's night general yardmaster received advance information from respondent's dispatcher at McComb of the approximate time of arrival of these three cars and when the period of confinement for the cattle would expire. Because of the necessity of prompt handling of the cattle and the improbability [difficulty] of handling it on regular trains, an extra engine and crew were procured and were in waiting for the arrival of the cars of cattle.

These cars were immediately switched and placed in the Crescent City Stock Yards for delivery at 2:50 a. m. on October 10, 1932, at which time the period allowed for the confinement of the cattle had not elapsed, and the car containing the cattle was placed for unloading within such period of time. (R. 13–14.)

It was further agreed that respondent's night general yardmaster, knowing how long the cattle had already been confined, failed to notify the employee of the Illinois Central Railroad whose duty it was to unload the car, that the cattle car was to be placed for delivery in the early hours of the morning, and because of this failure of the night general yardmaster, the car was not unloaded until 4 a. m. on the morning of October 10, 1932, the total period of confinement being 37 hours. It was the duty of the night general yardmaster, under the instructions of the Illinois Central Railroad Company, to notify the employee of that railroad as to when the cars would be placed for delivery (R. 14).

The case was submitted to the District Court on an agreed statement of facts. (R. 22.) Both parties moved for judgment (R. 15, 16) and the petitioner requested findings of fact and conclusions of law (R. 18–21). The court denied the petitioner's motion for judgment and request for findings of fact and conclusions of law and reserved to the petitioner a bill of exceptions to each of the rulings (R. 25) as well as a bill of exceptions (R.

26) to the findings of fact and conclusions of law which the court entered (R. 22–24). The court, thereupon, rendered judgment in favor of respondent (R. 27) dismissing the suit.

In its findings of fact, the court found, *inter alia,* that respondent "attempted in good faith to comply with the statutory requirement to unload the cattle within the statutory period" (R. 22); that the failure to unload within the statutory period "was due to the negligent oversight of the night yardmaster employed by the said defendant in failing to notify an employee of the Illinois Central Railroad Company to unload the said car of cattle within the statutory period" (R. 22–23); and the respondent, through its proper employee, knew how long the animals had been confined (R. 23).

In its conclusions of law, so far as they are here pertinent, the court held that Section 1 of the Act (U. S. C., Title 45, Section 71) should not be read in *pari materia* with Section 3 of the Act (U. S. C., Title 45, Section 73). In other words, in order to determine whether the default of the carrier has been "knowingly and wilfully" committed under Section 3, the language of Section 1 cannot be considered (R. 23). The court also held that the "negligence of an employee * * *" is not equivalent to knowledge and wilfulness as those words are used in Section 3 of the Act, and that "although there was actual negligence as set forth

in the conclusions of fact and the stipulation, there was no wilfulness and knowledge within the meaning of Section 73, Title 45 U. S. C. A. [Sec. 3 of the Act]."

Upon appeal, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court (R. 52–56).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the failure of respondent to unload the cattle did not render it liable to the penalty where such failure was due to the oversight or negligence of its night general yardmaster to notify the appropriate employee to unload the cars.

2. In failing to hold that the negligence of respondent rendered it, as a matter of law, liable to the statutory penalty.

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

1. The word "wilfully" as used in the statute here involved denotes an act which is voluntary as distinguished from accidental. There are many authoritative opinions which so define the word and the Government contends such definition is aptly suited to the application of the word as used in this statute.

A. In construing the words "knowingly and wilfully", Section 3 of the Act should be read in *pari materia* with Section 1. In the first section of the Act, Congress created a prohibition against overconfinement of animals by carriers. In the third section it imposed a sanction for a knowing and wilful violation of the prohibition. Legislative sanctions are usually as broad as their prohibitions. Where words such as "knowingly and wilfully", having many legal significations, are used in a statute, the entire context must be examined to determine the legislative intent.

B. The Cruelty to Animals Act is remedial in nature and the words "knowingly and wilfully" should be construed in a manner consistent with the humane objects of the Act. The fact that a penalty is imposed for a violation of its provisions does not make it a penal law in the sense that it must be strictly construed. In this case the penalty does not follow as the result of the commission of a crime but is a mere sanction to enforce an obligation validly imposed upon carriers by Congress to effect a public good. The Act being as it is a humanitarian law should be fairly and reasonably construed so as to effectuate its purpose.

C. The legislative history of the Act and the Congressional debates thereon, indicate clearly that Congress intended to subject to the penalty provision of the Act that carrier who, having full knowl-

edge of the facts, negligently fails to unload the animals within the statutory period.

D. The court below evidently entertained the belief that the statute here is in the nature of a criminal statute. It is believed that, because of this erroneous belief, the court applied the strict rules of construction applicable to such statutes. Though there is a conflict of decisions regarding the interpretation of the words "knowingly and wilfully" as used in this statute, the cases are uniform in holding that this is not in the nature of a criminal statute.

II. A careful analysis of the cases which have dealt with this statute discloses a preponderant weight of authority to the effect that the carrier who negligently fails to unload within the statutory period is subject to the penalty provision of the Act.

ARGUMENT

I

THE WORD "WILFULLY" AS USED IN THIS STATUTE DENOTES AN ACT WHICH IS VOLUNTARY AS DISTINGUISHED FROM ACCIDENTAL

In the case at bar the respondent failed to unload the cattle within the statutory period as a result of the negligence or oversight of its night general yardmaster who, having knowledge of the facts, failed to notify the employee charged with the duty of unloading the cattle. The sole question here is

whether this act of omission, with full knowledge of the facts, constitutes a violation of the Cruelty to Animals Act which penalizes one who "knowingly and wilfully" fails to comply with its provisions. The Government contends that such omission with knowledge of the facts constitutes a "knowing and wilful" failure. The opinion of the Circuit Court of Appeals (R. 55) seems to be predicated upon the assumption that the statute in question is in the nature of a criminal one and should therefore be strictly construed. The court discounted the view taken by the Government that the aforementioned words as used in this Act have no legal meaning apart from the exceptions provided in Section 1 of the Act. The court conceded a conflict in authorities as to the meaning and intent of the Act, citing several cases supporting the Government's contention. Despite these authorities the court below was of the opinion that the weight of authority runs strongly the other way, stating that the general rule is that the word "wilfully" when used in statutes of this kind has the well defined meaning of *deliberate* and *conscious* purpose. In other words, the court concluded that statutes using the word "wilfully" and imposing a penalty or punishment for its violation would apply to only "those who deliberately and consciously, that is, with set purpose, do what they are forbidden by the statutes to do. Such statutes do not subject to penalties those who, though they vio-

late them, do so unintentionally through oversight, or simple negligence." (R. 55.)

We submit that this construction of the statute here involved by the court below is not consonant with the plain meaning of its language.

This case, as shown, turns on the interpretation of the word "wilfully" as used in Section 3 of the Act. The word has a variety of well defined legal connotations. This variety of definition is attributable to the different classes of statutes in which it is used, as is indicated in *United States* v. *Murdock,* 290 U. S. 389, 394, where it is said:

> The word often denotes an act which is intentional, or knowing, or *voluntary as distinguished from accidental.* But when used in a criminal statute it generally means an act done with a bad purpose * * * without justifiable excuse * * * stubbornly, obstinately, perversely * * * or conduct marked by careless disregard whether or not one has the right so to act. [Italics ours.]

We submit the statute involved in this case represents that situation spoken of in the *Murdock* case *supra* wherein the word "wilfully" is used to connote an act which is voluntary as distinguished from accidental. The application of this construction is brought out in *United States* v. *Atchison, Topeka and Santa Fe Railway Company,* 166 Fed. 160 (N. D. Ill.), where the court construed "wil-

fully" in the Cruelty to Animals Act as synonymous with "voluntarily" and stated, p. 163:

> In the selection of this language Congress could not have inserted the word "wilfully" as implying a vicious intent to injure, for certainly Congress did not even suspect that any transportation company would ever confine live stock beyond the period prescribed for the *deliberate* purpose of inflicting injury on the stock or of imposing a loss upon the shipper or deteriorating the product of the slaughter-house. It is more rational to conclude that Congress used the word as synonymous with "voluntarily" or "intentionally," and, bearing in mind the object sought by the law, the legislative intent seems to have been to require the imposition of the penalty in all cases of confinement beyond the period prescribed, except only when resulting from storm or from accidental or other unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. [Italics ours.]

The necessity of this construction becomes quite obvious when the entire statute is read. Section 1 prohibits the overconfinement of animals unless caused by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. Section 3 provides a penalty for a knowing and wilful overconfinement. It cannot reasonably be

doubted that Congress intended by Section 3 to penalize the doing of that which it prohibited in Section 1.

A. IN CONSTRUING THE WORDS "KNOWINGLY AND WILFULLY" SECTION 3 OF THE ACT SHOULD BE READ IN *PARI MATERIA* WITH SECTION 1

The court below rejected the Government's contention that Section 3 must be read in *pari materia* with Section 1, because it says to do so, "we should have to assume that Congress in Section 3 idly used two words [knowingly and wilfully] of known and settled legal meaning, intending that the section should be read as though they were not in it" (R. 54). But this reasoning proves too much for the purpose of the court's conclusion. We do not contend that the words must be rejected, but rather that they be attributed a meaning consistent with the entire context of the statute. To construe the words as the court below has done, it is necessary to conclude that Congress idly created a broad prohibition against overconfinement of animals in Section 1, and placed a very narrow sanction on its violation in Section 3. Legislative sanctions are usually as broad as their prohibitions.

Mr. Justice Story, commenting on a more or less similar situation in *United States* v. *Winn*, 3 Sumn. 209, says at p. 211:

> And where a word is used in a statute, which has various known significations, I know of no rule, that requires the Court to adopt one in preference to another, simply because it

> is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all of these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words, which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature.

See also *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18, wherein this language is quoted with approval. The *Murdock* case, *supra,* is also to the same effect. At page 395 it is said:

> Aid in arriving at the meaning of the word "willfully" may be afforded by the context in which it is used (*United States* v. *Sioux City Stock Yards Co.*, 162 Fed. 556, 562.)

It is elementary law that every part of the statute should be read and the intention of the legislature extracted from the whole. See *Hellmich* v. *Hellman,* 276 U. S. 233; *Larkin* v. *United States,* 78 F. (2d) 951 (C. C. A. 8th).

B. THE CRUELTY TO ANIMALS ACT IS REMEDIAL IN NATURE AND THE WORDS "KNOWINGLY" AND "WILLFULLY" SHOULD BE CONSTRUED IN A MANNER CONSISTENT WITH THE OBJECTS OF THE ACT

The main object of the Act is to prevent cruelty to animals in transit. Another purpose is to prevent the slaughtering of animals for food when in a feverish condition resulting from long confine-

ment without food, water and rest. *United States* v. *Union Pacific Railroad Company,* 169 Fed. 65 (C. C. A. 8th); *United States* v. *Atlantic Coast Line Railroad Company,* 173 Fed. 764 (C. C. A. 4th). Since it acts to effect a public good, it is a remedial statute and should be construed in a manner so as to carry out the intention of Congress and effectually accomplish its objectives. The fact that a penalty is imposed for a violation of its provisions does not make it a penal law. The desire to give relief was more dominant than to inflict punishment for, while in one sense every Act imposing a penalty or forfeiture may be called a penal law, yet, as in the present case, such laws are often deemed, and truly deserve to be called, remedial. *Taylor* v. *United States,* 3 How. 197, 210; *Cliquot* v. *United States,* 3 Wall. 114, 145; *United States* v. *Stowell,* 133 U. S., 12; *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1.[1] In this case the penalty does not follow as the result of the commission of a crime, but is a mere sanction to enforce an obligation validly imposed by Congress. See *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 331.

The question as to whether the Cruelty to Animals Act should be viewed as penal or remedial

[1] In this case, the Court in discussing the Safety Appliance Law said, at p. 17, "The primary object of the act was to promote public welfare by securing the safety of employees and travelers and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal."

appears to have been settled by this Court in *Chicago & N. W. Ry. Co.* v. *United States,* 246 U. S. 512, where it was said (p. 517) that "the statute must be construed with a view to carrying its humanitarian purpose into effect * * *."

It is to be noted also that Section 4 of the Act provides that the penalty created by the preceding section should be recovered by civil action. In *United States* v. *Atlantic Coast Line Railroad Company, supra,* regarding the statute involved in this case, the court stated, at p. 767:

> It has been decided a number of times that the statute in question is not a criminal one, and that it should not be construed according to the strict rules by which courts are governed in criminal cases.

See also *New York Central & H. R. Railroad Co.* v. *United States,* 165 Fed. 833.

But even if the Act should be thought to be penal in a strict sense, inquiry into the intention of Congress is still proper and necessary. The Act should be interpreted according to the manifest import of the words and the most restricted sense should not be adopted as the true sense of the statute, merely because it imposes a penalty, unless it harmonizes with the legislative intent and accords to the remedy designed for the mischief. In *United States* v. *Lacl r,* 134 U. S. 624, the Court stated, p. 628:

> though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal

as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

C. THE LEGISLATIVE HISTORY AND CONGRESSIONAL DEBATES DISCLOSE THAT THE CRUELTY TO ANIMALS ACT WAS AIMED AT A CARRIER WHO, HAVING KNOWLEDGE OF THE FACTS, VOLUNTARILY FAILS TO UNLOAD THE ANIMALS WITHIN THE STATUTORY PERIOD

It has heretofore been shown that where a word which has various known significations has been used in a statute, it is the duty of the court to search out and follow the intent of the legislature and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature. The intent and purpose of Congress in using the words "knowingly and wilfully" in the Act here involved were clearly indicated when the Cruelty to Animals Act of March 3, 1873,[2] which subse-

[2] The Act of 1873, is the first Act dealing with what is commonly known as the Twenty-Eight-Hour Law. It is set forth in the Appendix, *infra*, pp. 34–36. In this Act the word "wilfully" is used. When this Act was copied into the Revised Statutes, Sections 4386–4390, the word "willingly" was substituted for "wilfully". Nothing has been found to indicate any reason for this substitution and we assume it was merely a typographical error. When the Act of 1906 was passed the provisions of R. S. 4386–4390 were repealed. The word "wilfully" is used in the Act of 1906. Nothing appears in the debates on this Act (Congressional Record, Vol. 40, pp. 8310, 8324) or in the Senate Report (No. 975, 59th Cong., 1st sess., Cong. Doc. 4904), with reference to this change. We accordingly assume it was made merely to correct the error heretofore suggested.

The Act of 1906 substantially reenacted the provisions of the Act of 1873. The only revision consisted of an extension

quently became R. S. 4386–4390, was debated. These debates are published in the Congressional Globe, Vol. 104, Part 5, 42d Congress, 1st Session at p. 4228, the pertinent parts of which are here set out:

> Mr. THURMAN. * * * How is it possible for the managers of one of these short roads to tell whether these cattle have been watered and fed and allowed 5 hours' consecutive rest within the last 28 hours? If ignorance of the fact is to excuse, then the bill is not effective; but if the company is to be punished without *knowing the fact* at all, although it acts in entire ignorance of it, then the bill is unjust.
>
> It seems to me that this requires some provision in this bill. * * * I am not prepared with an amendment. It would take considerable time to prepare an amendment that would meet that case; and yet the truth of it is that this bill visits the punishment upon the railroad company, *which has no knowledge* and *can have no certain knowledge,* has no means of knowledge whether the cattle have been properly cared for pursuant to the bill or not * * *. [Italics ours.]
>
> Mr. FRELINGHUYSEN. I will just say a word in answer to the Senator from Ohio, (Thur-

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of time from twenty-eight to thirty-six hours upon the written request of the owner or person in custody of the shipment. The Senate Report (there was no House Report) and the debates on this Act disclose nothing with regard to the meaning intended for the words "knowingly and wilfully". The 1906 Act incorporates these words as they were used in the original Act of 1873.

man) as he is a strong friend of the bill, which I do not question. As to the difficulty which he suggests, it does not occur to me at all. The difficulty is as to a railroad company not having the information as to how long cattle have been confined in the cars, 28 hours when a train comes to the railroad in question. * * * A way bill goes with the cattle, and at once, as soon as this bill is passed this fact would be on the way bill. There is not the slightest difficulty in the railroad company making arrangements so as to know with unerring certainty just how long the cattle have been in the cars. Besides that, if from the circumstances, they were deceived on the subject, they would not be guilty. I think that is a perfect answer.

Finally, on page 4235, the following proceedings are set forth:

Mr. CASSERLY. I wish to offer an amendment to insert on line 28, page 2, after the word "shall," the words "knowingly and wilfully;" so that a company which receives animals that have already been 28 hours without rest, water, or food, shall not be liable except the *scienter* is proved; in other words, except it is shown that the company *knew the fact*. [Italics ours.]

Mr. FRELINGHUYSEN. That is wholly unnecessary; that is the law now.

* * * * *

The yeas and nays were ordered; and being taken resulted—yeas, 22—nays, 18. * * * So the amendment was agreed to.

Under R. S. Sections 4386–4388, negligence of the carrier was held to be no defense. *Newport News & M. Val. Co.* v. *United States,* 61 Fed. 488 (C. C. A. 6th). In that case the failure to unload the cattle within the statutory period was due to an accident which was the result of the carrier's negligence. At p. 490 the court said:

> * * * If the accident was one which might have been avoided by due care, then the carrier must be taken to have contemplated the reasonable consequences of his own negligence. In this sense, he may be said to have "knowingly and willingly" failed to comply with the requirements of the law. If he was not prevented by lawful excuse, he has knowingly and willingly failed to unload for rest, food, and water, as required by law. The several sections of the act must be construed together. We must give effect to the first section, as well as to the third. To put the construction upon the words "knowingly and willingly" contended for by appellant, would be to eliminate the positive terms of the affirmative section of the act. Congress has specified the excuse which will take a case without the act. If the statutory contingencies are not shown to have prevented compliance, the carrier has willingly failed to unload as required.

The *Newport News* case is the only case found under R. S. Sections 4386–4388, wherein the defense

of negligence was raised and decided. No case presenting this question appears to have arisen under the original Act. It is submitted that since the penalty provisions of R. S. Sections 4386–4388 are substantially reenacted in the Act of 1906, Congress intended also to incorporate the judicial interpretation thereof.

Clearly Congress intended that a connecting carrier that had knowledge of the time of confinement and who nevertheless failed to unload the animals within the statutory period should be liable for the penalties. In the instant case, the carrier admitted having knowledge of the facts (R. 14), but negligently failed to unload the cattle, not being prevented by accidental or unavoidable causes. Congress obviously did not intend that *negligence* should be a good defense since it would defeat the purpose of the Act as indicated in the debates.

D. THE COURT BELOW ERRED IN REGARDING THE ACT AS A CRIMINAL STATUTE

The court below concludes its opinion (R. 55) as follows:

> In *Hargrove* vs. *United States*, 67 Fed. (2d) 821, in a criticism of the charge of the trial court, under a statute making wilfulness an element of the offense, it was said—
>
> "The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its wilful doing. In the first class of cases, especially in

> those offenses mala prohibita, the law imputes the intent * * *. Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence."

It seems that the court here apparently places this case in that class of cases wherein a wrongful intent must be shown. This, we submit, is error. The *Hargrove* case in the quotation *supra* was dealing with the various classes of criminal statutes. Whatever conflict exists on the interpretation of the statute involved in this case, there is uniformity at least in the decisions to the effect that this is not a criminal statute. It is believed that the court below in failing to observe the distinction between criminal statutes and the statute involved in this case, was thereby misled into applying the strict rules of construction relating to criminal statutes.

The Cruelty to Animals Act deals with conduct which is not *malum in se* but *malum prohibitum* and it is not necessary to establish an evil intent to impose liability. *United States* v. *Union Pacific Railroad Co.*, 169 Fed. 65 (C. C. A. 8th). And in *United States* v. *Sioux City Stockyards Company*, 162 Fed. 556, 562, it was said:

> The statute in question [Cruelty to Animals Act] is not a criminal one in the sense that a violation of it constitutes a crime. A

> penalty is imposed for the violation, which is to be recovered by civil action in the proper Circuit or District Court of the United States.

The penalty provided in Section 3 of the Act here involved does not follow as the result of the commission of a crime but is a mere sanction to enforce an obligation validly imposed by Congress. Even if it be conceded that this statute is penal in nature, it is submitted that it would not be subject to the same strict rules of construction as apply to criminal statutes.

II

The Preponderant Authority Is to the Effect That a Carrier Who, With Full Knowledge of the Facts, Negligently Fails to Unload Within the Statutory Period Is Subject to the Penalty.

Although "wilfully" as used in the Act has been given different definitions, the majority of the cases have penalized a connecting carrier for overconfinement of animals where it had knowledge of the facts and was not prevented from unloading because of accidental or unavoidable causes. It is contended that construing "wilfully" as equivalent to "negligently" is not inconsistent with the decisions in these cases.

In *United States* v. *Atantic Coast Line Railroad Company, supra,* the facts were similar to the instant case. An employee of defendant having knowledge of the time of confinement failed to

call the attention of another employee to the fact that one of the cars contained cattle and, owing to this failure, that car was not promptly forwarded and delivered, with the result that the animals were confined longer than the statutory period. The court held that "negligence" was no defense, stating, p. 769:

> It is well settled that a corporation can only act through its agents, and, such being the case, it necessarily follows that a lack of foresight and due diligence on the part of those acting as agents in complying with the statute is negligence. Therefore, in this instance, we think the corporation has, within the meaning of the statute, "knowingly" and "wilfully" failed to comply with the law, notwithstanding the fact that there may have been no evil motive or intent in the transaction. In other words, we think a negligent failure to comply with the law, with a knowledge of facts as shown in this instance, is wilfull failure.

Similarly in *Montana Central Railway Company* v. *United States,* 164 Fed. 400, (C. C. A. 9th), the Circuit Court of Appeals upheld the lower court in sustaining the Government's demurrer to the answer filed by the carrier setting forth an affirmative defense of *negligence,* holding that allegations of "oversight, forgetfulness, and unintentional neglect" of the employees expressly negatived the claim that failure to rest, feed and water the ani-

mals within the statutory period was not the result of knowledge and wilfullness on the part of the carrier. In other words, "negligence" was no defense.

In *Oregon-Washington Railroad & Navigation Company* v. *United States,* 205 Fed. 337 (C. C. A. 9th), the appellant placed a car of swine at an unloading chute in its yards at destination, but not at the regular unloading pens of the consignee and, receiving assurance from the caretaker of the animals that the consignee thereof had promised to unload them, left them there without unloading until after the statutory period had expired. The court held that the *negligence* of the defendant in failing to see that the swine were unloaded, notwithstanding the assurance received, was evidence of indifference to the statutory requirements sufficient to go to the jury. Cf. *St. Joseph Stockyards Company* v. *United States,* 187 Fed. 104, (C. C. A. 8th); *Southern Pacific Co.* v. *United States,* 171 Fed. 360 (C. C. A. 9th); *United States* v. *Stockyards Terminal Railway Company,* 178 Fed. 19, (C. C. A. 8th); *New York Central H. R. Railroad Co.* v. *United States* 203 Fed. 953 (C. C. A. 2d).

Mr. Justice Van Devanter, while a member of the Circuit Court of Appeals for the Eighth Circuit stated in the case of *St. Louis & S. F. R. Co.* v. *United States,* 169 Fed. 69 (C. C. A. 8th), that:

> "Willfully" means something not expressed by "knowingly" else both would not be used

> conjunctively. And presumptively it means something not expressed by "willingly," else the change from that word would not have been made when the old statute (Rev. Stat. §§ 4386–4390) was being reenacted. * * * But it does not mean with intent to injure the cattle or to inflict loss upon the owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. *United States* v. *Union Pacific R. R. Co., supra.* So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

While the language of this definition appears unnecessarily strict, the language in *United States* v. *Union Pacific Railroad,* 169 Fed. 65 (C. C. A. 8th), cited in the above quotation shows the application intended by that court. In the latter case, the defendant contended that "wilfully" implies an evil purpose or bad motive and submitted that this was absent, even though it knowingly failed to unload the animals because prevented from so doing by the press of unusual business. The court stated, p. 68:

> The answer admits that the defendant *knowingly—that is, intentionally*—kept the live stock confined in cars without unloading for more than 28 hours, and did this merely be-

> cause of a great and unusual press of business as there stated. This in our opinion is an admission that it was willfully done within the true meaning of the statute. Otherwise we must concede, which we cannot do, that a mere press of business justifies a disregard of the law.

The court concluded that the great and unusual press of business described in the answer did not, as a matter of law, amount to an accidental or unavoidable cause which could not have been anticipated by the exercise of due diligence.

Thus, the Eighth Circuit Court of Appeals in the two cases mentioned above seems clearly to have adopted the view that a carrier having knowledge of the facts who fails to sustain the burden set forth in Section 1, "that it was prevented from unloading as a result of accidental or unavoidable cause which could not have been anticipated or avoided by the exercise of due diligence and foresight," is guilty of a violation of the Act and may be penalized under Section 3. It follows that negligence of a carrier, with knowledge of the facts, which gives no exemption under Section 1, is no defense to an action based on Section 3.

Furthermore, it has been held that a carrier that has over-confined cattle as a result of a breakdown "must show that the breakdown did not result from a cause which due diligence and foresight would have anticipated and avoided." *United States* v. *Southern Pacific Co.*, 157 Fed. 459, 461 (N. D.

Calif.). It seems clear that since the carrier that makes every effort to unload animals within the statutory period, but miscalculates its ability and is prevented from so doing by traffic congestion or by accidents due to its own negligence is liable to the penalty, the carrier that forgets to unload them should also be liable.

The exceptions to the proposition stated above are the cases of *United States* v. *Lehigh Valley Railroad Company,* 204 Fed. 705 (C. C. A. 3d), and *United States* v. *Southern Railway Company,* 1 F. (2d) 607 (E. D. Tenn.). In *United States* v. *Lehigh Valley Railroad Company, supra,* the Circuit Court of Appeals for the Third Circuit held that "wilfull" means something more than negligence, which view was supported by *United States* v. *Southern Railway Company, supra.*

Whatever the conflict in the lower courts, we believe the entire question as to whether negligence of the carrier with full knowledge of the facts constitutes wilfullness within the meaning of this statute has been settled by this Court in *Chicago & N. W. Ry. Co.* v. *United States,* 246 U. S. 512. While holding that the overconfinement was caused by accident, nevertheless this Court in discussing the diligence and foresight to be exercised by the carrier in order to avoid the penalty said at p. 518:

> Thereafter the duty is on the carrier to exercise the diligence and foresight which

> prudent men, experienced in such matters, would adopt to prevent accidents and delays and to overcome the effect of any which may happen—with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused.

In stating that diligence and foresight must be exercised to overcome the effects of an accident, this Court seems clearly to have viewed negligence as an insufficient defense.

It is submitted that the admitted negligence in this case is not that standard of diligence and foresight which this Court has laid down as the norm for delay which is excusable.

The court below states that the current of authority supports its construction that "wilfully" means "deliberate" and "with conscious purpose." While it is true there is a conflict, a number of the decisions cited by the court below do not support its conclusion. In *Oregon-Washington Railroad & Navigation Company* v. *United States,* 205 Fed. 337 (C. C. A. 9th), *supra,* where the facts were substantially the same as in the instant case, the court held that they were indicative of a violation of the Act. In *Chicago, Burlington & Quincy Railroad* v. *United States,* 194 Fed. 342 (C. C. A. 8th), there was no evidence of negligence. In *St. Joseph Stockyards Company* v. *United States,* 187 Fed. 104, (C. C. A. 8th), the question of negligence was

not involved. In *St. Louis & Santa Fe Railway Company* v. *United States, supra,* and in *Merchants Bridge Terminal Railway Company* v. *United States,* 209 Fed. 600 (C. C. A. 7th), it was held that there was not sufficient evidence to support the finding of lack of diligence on the part of the carrier. *United States* v. *Boston & Maine Railroad Company,* 84 F. (2d) 365 (C. C. A. 1st), was decided on a procedural question.[a]

As a matter of fact, practically all the violations of the Twenty-eight Hour Law are due, in the final analysis, to negligence in one form or another of railroad employees, rather than to any deliberate purpose to violate the Act.

In *United States* v. *Union Pacific Railroad Company, supra,* the court stated, p. 68:

> It can hardly be conceived that any reputable carrier would deliberately and designedly because of ill will or other malevolent feeling towards the dumb animals or their owners fail to conform to the reasonable and humane requirement of the law. If the law

[a]This case was presented to the District Court on an agreed statement of facts but no request was made for findings of fact. The Circuit Court of Appeals, therefore, did not consider the merits of the case, but dismissed it on the ground that the agreed facts did not contain all the facts essential to a judgment, and finding of an ultimate fact one way or another was required for its justification. Judge Morton in a concurring opinion stated that the rule is too artificial. Since the court in the instant case made findings of fact and conclusions of law, this case has no bearing on the question under consideration.

be operative only to restrain the possible exercise of such evil and perverse disposition, it would have little, if any, scope of operation. The real purpose of the legislation in our opinion was to alleviate the condition of dumb animals in transit. The desire to curtail expense and promote economy of operation naturally encourages indifference to if not a disregard of every impediment to quick and cheap transportation. The act of June 29, 1906, we think, was aimed at this natural propensity, and is a condemnation of indifferent more than malevolent conduct. So far as the dumb animals are concerned, the effect is the same in either case. They would suffer just as much if deprived of rest, water, and food by indifference of the carrier as they would by his malevolence. The meaning we ascribe to the word "willfully" gives a reasonable scope of operation to the act, while the meaning contended for by defendant's counsel practically nullifies it.

The foregoing reasoning applies to conduct which reflects negligence as well as to that which reflects indifference. If negligence alone will be sufficient to escape the sanctions of the Act, the major incentive toward humane care of animals in transit will have been lost.

CONCLUSION

We respectfully submit, for the reasons set forth, at the judgment of the court below should be reversed.

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January, 1938.

APPENDIX

The Cruelty to Animals Act, as incorporated in United States Code, Title 45, Sections 71–73, Act of June 29, 1906, c. 3594, Secs. 1–4, 34 Stat. 607, as amended.

SECTION 71. No railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of

confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this chapter to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided,* That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SECTION 72. Animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section 71 of this chapter, but nothing in this section

shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

SECTION 73. Any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than $100 nor more than $500: *Provided,* That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

SECTION 74. The penalty created by the preceding section shall be recovered by civil action in the name of the United States in the district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States Attorneys to prosecute all violations of this chapter reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

Act of March 3, 1873, c. 252, Secs. 1–4, 17 Stat. 584, 585:

CHAP. CCLII. An Act to prevent Cruelty to Animals while in Transit by Railroad or other means of Transportation within the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no

railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State to another, shall confine the same in cars, boats, or vessels of any description, for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated. Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing then by the railroad company or owners or masters of boats or vessels transporting the same at the expense of said owner or person in custody thereof; and said company, owners, or masters shall in such cases have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals authorized by this act. Any company, owner, or custodian of such animals, who shall knowingly and willfully fail to comply with the provisions of this act shall, for each and every such failure to comply with the provisions of this act, be liable for

and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided, however,* That when animals shall be carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply.

SEC. 2. That the penalty created by the first section of this act shall be recovered by civil action in the name of the United States, in the circuit or district court of the United States holden within the district where the violation of this act may have been committed; or the person or corporation resides or carries on its business; and it shall be the duty of all United States marshals, their deputies and subordinates, to prosecute all violations of this act which shall come to their notice or knowledge.

SEC. 3. That any person or corporation entitled to lien under the first section of this act may enforce the same by a petition filed in the district court of the United States holden within the district where the food, care, and custody shall have been furnished, or the owner or custodian of the property resides; and said court shall have power to issue all suitable process for the enforcement of such lien by sale or otherwise, and to compel the payment of all costs, penalties, charges, and expenses of proceedings under this act.

SEC. 4. That this act shall not go into effect until the first day of October, eighteen hundred and seventy-two.

Approved, March 3, 1873.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

No. 352

UNITED STATES OF AMERICA,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
A CORPORATION.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF IN OPPOSITION TO APPLICATION TO GRANT WRIT OF CERTIORARI.

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF IN OPPOSITION TO APPLICATION TO GRANT WRIT OF CERTIORARI.

May It Please the Court:

The opinion of the Circuit Court of Appeals, reported in *90 F. (2d) 213*, does not involve any new or unusual point of law, nor place any new construction on the statute involved, nor does it involve any proposition of law which can be seriously controverted.

There is involved here only the application of the Cruelty to Animals Act of June 29, 1906, Sections 1, 3 and 4, as amended, *(U. S. C., Title 45, Sections 71, 73, 74)*,